UNITED STATES
CIVILIAN BOARD OF CONTRACT APPEALS

DENIED: October 19, 2007

CBCA 648

CORNERS AND EDGES, INC.,

Appellant,

v.

DEPARTMENT OF HEALTH AND HUMAN SERVICES,

Respondent.

John E. Larson, Secretary of Corners and Edges, Inc., Hamilton, MT, appearing for Appellant.

Mogbeyi E. Omatete, Procurement, Office of the General Counsel, Department of Health and Human Services, Washington, DC, counsel for Respondent.

Before Board Judges **BORWICK**, **SHERIDAN**, and **KULLBERG**.

BORWICK, Board Judge.

Appellant, Corners and Edges, Inc. (appellant or CEI), appeals from the contracting officer's denial of its claim of breach of its janitorial services contract with the Rocky Mountain Laboratories (RML), within respondent, Department of Health and Human Services (DHHS). Respondent moves for summary relief, maintaining that the undisputed facts entitle it to prevail as a matter of law. Although appellant opposes respondent's motion, we agree with respondent. For the reasons explained below, we conclude that the undisputed material facts and application of case law entitle respondent to prevail in this appeal. Consequently, we grant respondent's motion for summary relief and deny the appeal.

Background

The following facts are undisputed:

The janitorial services acquisition in this case was handled by contracting officer Ms. Lynda Kieres, employed by the Acquisition Management and Operations Branch (AMOB) RML in Hamilton, Montana.[1] Respondent's Motion for Summary Relief, Exhibit B (Declaration of Ms. Lynda L. Kieres (Aug. 10, 2007)) ¶ 1.

The AMOB handled the janitorial services procurement for the RML for a number of years and in 1998 had entered into a previous contract with appellant that expired after the fourth option year. Respondent's Motion for Summary Relief, Exhibit B, ¶ 4. Respondent had anticipated soliciting a new five-year term janitorial services contract. That acquisition, however, had been subject to an Office of Management and Budget (OMB) A-76 process and protest, administered by NIH's Office of Research Facilities (ORF).[2] Respondent's Motion for Summary Relief, Exhibits B, ¶ 4; C, ¶¶ 4-5.

In October 2003, the A-76 procurement for janitorial services was awarded to the Government In-House Most Efficient Organization. Respondent's Motion for Summary Relief, Exhibit C, ¶ 4. In order to ensure continuation of janitorial services at the RML during the A-76 process, respondent elected to issue several one-month bi-lateral extensions to appellant's contract for appellant to provide janitorial services through December 2004. Respondent's Motion for Summary Relief, Exhibit B, ¶ 4

On November 12, 2004, respondent issued a notice of intent (NOI), which provided in pertinent part:

[1] The AMOB is within the Division of Extramural Activities (DEA), National Institute of Allergy and Infectious Diseases (NIAID), National Institutes of Health (NIH), DHHS. Respondent's Motion for Summary Relief, Exhibit B, ¶ 1.

[2] OMB Circular A-76 establishes federal policy and sets forth procedures for determining whether certain activities should be performed under contract with commercial sources or in-house using government facilities and personnel. It requires the use of the procurement process to effectuate this federal policy. *Vanguard Technologies Corp.*, GSBCA 8885-P, 87-2 BCA ¶ 19,814.

> This notice is a combined synopsis/solicitation, Notice of Intent. The Government intends to negotiate on a sole-source basis with Corners & Edges for an interim janitorial services contract. . . . This announcement constitutes the only solicitation; quotes are not being requested and a written solicitation will not be issued. . . . This acquisition will be processed under [Federal Acquisition Regulation] FAR Part 12--Acquisition of Commercial Items and is a Total Small Business Set-Aside.
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> . . . .
>
> SCHEDULE: The NIH/NIAID Rocky Mountain Laboratories intends to award a purchase order to Corners & Edges . . . for an interim janitorial services contract as described in the STATEMENT OF WORK (available upon request). This order is a follow-on contract for existing services with the incumbent contractor.
>
> . . . .
>
> Period of Performance will begin 12/01/04 and end approximately 7/31/05.

Appellant's Supplemental Appeal File, Exhibit 5; Appellant's Statement of Uncontested Facts ¶ 2. In addition to announcing an intent to proceed with a sole source contract with appellant, the NOI solicited other offers, which were required to be submitted no later than 4:30 p.m., Mountain Daylight Time, on November 22, 2004. Appellant's Supplemental Appeal File, Exhibit 5.

On or about November 30, 2004, appellant and the Government entered into purchase order 263-MO-503012. Appeal File, Exhibit 3. Purchase order 263-MO-503012 provided in pertinent part:

> PERIOD OF PERFORMANCE BEGINS 12/1/04 <u>THROUGH APPROX. 7/31/05</u>.

Appellant's Statement of Uncontested Facts ¶ 1; Appeal File, Exhibit 3 (emphasis added). The purchase order was for janitorial services and stated: "PROVIDE JANITORIAL SERVICES--ESTIMATED 8 MONTHS." Appellant's Statement of Uncontested Facts ¶ 1; Appeal File, Exhibit 3. Purchase order 263-MO-503012 also provided that the "quantity ordered" was "8 MON[THS]" at a unit price of $6600 for a "grand total" amount of $52,800. Appeal File, Exhibit 3.

The contracting officer attests that the decision to use this procurement process, and the term "approximately," reflected the short-term nature of the requirement. Respondent's Motion for Summary Relief, Exhibit B, ¶ 6. Respondent anticipated that NIH might assume the responsibility for acquiring janitorial services at any time before the July 31 expiration date requiring respondent to issue a convenience termination notice if NIH did take over the requirement. *Id.*

Mr. Mark Mora is a certified project officer (CPO) at the RML. Respondent's Motion for Summary Relief, Exhibit C (Declaration of Mark Mora (Aug. 9, 2007)), ¶ 1. He was responsible for the technical aspects associated with certain purchase orders and contracts at the RML, including oversight and inspection of janitorial service contracts. He was not delegated the authority to award or authorize changes to either purchase orders or contracts. *Id*. ¶ 2.

On or about July 18, 2005, Mr. Mora contacted NIH's ORF concerning the status of the A-76 protest affecting the janitorial services requirement at the RML. Mr. Mora sought to ascertain whether the protest would be resolved by July 31, 2005, so that the MEO could commence performing janitorial services at the RML. ORF advised that settlement was not expected until approximately January 2005 and requested the RML consider issuing a purchase order for janitorial services through November 2005. Respondent's Motion for Summary Relief, Exhibit C, ¶ 4.

Sometime after July 18, Mr. Mora advised his purchasing department of ORF's decision and the need to extend the current purchase order with CEI, which Mr. Mora regarded as expiring on July 31, 2005. Mr. Mora advised the purchasing department that the period of performance should be from August 1 through November 30, 2005. Respondent's Motion for Summary Relief, Exhibit C, ¶ 5.

On or shortly after July 18, 2005, Mr. Mora contacted Mr. John Larson, appellant's secretary, and informed him that the A-76 protest would not be settled by July 31 and therefore the RML would pursue extending the purchase order with CEI from August 1 through November 30, 2005. Mr. Mora asked Mr. Larson whether CEI would be willing to perform services at the same monthly rate as the previous purchase order. Mr. Larson responded affirmatively. Respondent's Statement of Uncontested Facts ¶ 6; Respondent's Motion for Summary Relief, Exhibit C, ¶ 6.

On or about July 21, Mr. Mora prepared a preliminary funding document with appellant as a suggested source. Respondent's Motion for Summary Relief, Exhibit C, ¶ 8. The funding document was sent to the purchasing department to initiate an acquisition to

extend purchase order 263-MO-503012. *Id*. Mr. Mora understood that he had no authority under the FAR, specifically FAR 1.602, to commit respondent to a binding contract. *Id*.

After receipt of Mr. Mora's funding document, on July 26, a RML purchasing agent prepared proposed modification 263-MO-503012-1 to extend the period of performance for an additional four months. Respondent's Motion for Summary Relief, Exhibit B, ¶ 7. The proposed modification was cancelled due a typographical error. *Id*. ¶ 8. A second proposed modification --263-MO-503012-2-- was prepared the next day, and was presented to the contracting officer for her review and approval. *Id*. The proposed modification contemplated extending the period of performance an additional four months, until November 30, 2005. Appeal File, Exhibit 9.

The contracting officer signed the modification before realizing that the action could not be completed because it would violate the Competition in Contracting Act and FAR 5.201(b)(1)(ii), which requires that a modification for additional supplies or services be synopsized.[3] Respondent's Motion for Summary Relief, Exhibit B, ¶ 8. On or about July 28, 2005, the contracting officer notified the purchasing agent and Mr. Mora that respondent could not proceed with the modification because the FAR regulation precluded it from doing so. *Id*., Exhibit 9.

On July 27, Mr. Mora met with the RML's security contractor, who complained that Mr. Larson had on several occasions entered the women's restroom unannounced, while it was in use by one of the security contractor's female employees. Respondent's Motion for Summary Relief, Exhibit B, ¶ 9. The next day, Mr. Mora met with Mr. Larson and requested that Mr. Larson knock and announce himself before entering restrooms to perform custodial duties. *Id*. ¶ 10. A heated argument ensued between Mr. Larson and Mr. Mora, whereupon Mr. Mora confiscated Mr. Larson's security badge. *Id*. Nonetheless, appellant continued to perform work under the contract through July 31 and was fully paid. *Id*.

In light of the incident on July 28 with Mr. Larson, both Mr. Mora, and the contracting officer considered it necessary to change the statement of work in future janitorial service acquisitions to require a contractor's employees to knock and announce themselves before entering restrooms to perform custodial work. Respondent's Motion for Summary Relief, Exhibits B, ¶ 12; C, ¶ 12.

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[3] A synopsis is an agency's public notice of a proposed contract action. 48 CFR 5.201(a) (2005).

On July 29, respondent's procurement personnel issued a determination and finding (D&F) concerning waiver of synopsis for a proposed contract action. The D&F read in pertinent part:

> A contract for janitorial services was issued for the period 12/1/04-7/31/05 at which time the [ORF] intended to take responsibility for contracting for this service. Due to A-76 proceedings, ORF was not able to issue a contract to begin on 8/1/05 and RML intended to modify the current contract until such time that ORF could issue a new [contract] (estimated to be four months). Because of an incident that occurred on 7/28/05 that caused a change to the Statement of Work, the current contract could no longer be modified to extend the period of performance and a new Request for Quotations [RFQ] was issued on 7/29/05 with a closing date of 8/1/05. New market research revealed two additional vendors to solicit quotations from [names of specific vendors omitted], who attended a site visit and received the RFQ packet on 7/29/05. The incumbent contractor was also invited to provide a quotation and received the RFQ package on 7/29/05.

Appellant's Supplemental Appeal File, Exhibit 7.

On July 29, the contracting officer notified Mr. Larson by telephone that appellant's existing contract would not be extended beyond July 31, 2005. Respondent's Statement of Uncontested Facts ¶ 11; Respondent's Motion for Summary Relief, Exhibit B, ¶ 10. The contracting officer then notified appellant by letter as follows:

> Per the terms and conditions, this Purchase Order will expire as of midnight, Sunday, July 31, 2005. This is not a termination of any agreement between [appellant] and the [RML], but is a natural expiration of the Purchase Order as it has reached the conclusion of the period of performance. This order was issued as a stand-alone Purchase Order without options.

Appeal File, Exhibit 10.

Respondent paid appellant $52,800 for the work performed under purchase order 263-MO-503012. Respondent's Statement of Uncontested Facts ¶ 4; Appeal File, Exhibit 3. Appellant did not perform any work under that purchase order beyond July 31, 2005. Respondent's Statement of Uncontested Facts ¶ 5; Respondent's Motion for Summary Relief, Exhibit B, ¶ 16.

Ms. Desi Larson, one of appellant's employees, continued working alone and was able to complete by herself assigned tasks through July 31, 2005, without the assistance of Mr. Larson. Appellant's Opposition to Respondent's Motion for Summary Relief, Exhibit F (Declaration of Ms. Desi Larson (Aug. 24, 2007)), ¶¶ 6-8. However, she attests that after the expiration of the purchase order that she was unable to perform "the task requirements for the week of Monday, August 1 through Friday, August 5, 2005, without help from John Larson." *Id*., Exhibit F, ¶ 9.

On or about August 3, 2005, respondent awarded a contract to Quality Maintenance Enterprises for the janitorial work at the RML. Appeal File, Exhibit 4, Tab "Additional Evidence," Exhibit 4. Appellant protested the award at the Government Accountability Office (GAO), *Id*. On September 2, 2005, GAO dismissed the protest. *Id*., Exhibit 11. On September 12, 2005, appellant sought reconsideration of the dismissal, which the GAO denied on September 25, 2005. *Id*., Exhibits 12, 13.

On April 28, 2006, appellant submitted a breach of contract claim to the contracting officer, alleging that respondent had breached purchase order 263-MO-503012. Appeal File, Exhibit 12. Appellant claimed that Mr. Mora, the CPO, had orally assured appellant that if appellant's price remained "sane," respondent would extend purchase order 263-MO-503012 until such time as the A-76 protest was resolved using the same urgent and compelling rationale that was used to justify the original purchase order. *Id*. Appellant maintained that Mr. Larson had offered to Mr. Mora, "who represented himself as the delegated contracting authority for [the RML]," appellant's continued janitorial services for as many months as it would take for the A-76 competition to be resolved. Appellant claims that Mr. Mora accepted his offer. *Id*.

Appellant claimed that "without rational notice" to appellant, purchase order 263-MO-503012 was not extended in accordance with the oral agreement, and was, instead, terminated. Appellant also complained that the services were re-competed. Appellant sought damages of $59,400, which represents $6600 per month for a nine-month period of August 6, 2005, through April 30, 2006. Appeal File, Exhibit 12.

On October 10, 2006, appellant submitted an amended claim, increasing its alleged damages to $84,966, because the contracting officer extended the performance of the follow-on contractor to September 30, 2006. Appellant also complained that respondent, during the follow-on procurement process, had failed to consider appellant's "four alternative quotes." Appeal File, Exhibit 13.

On November 30, 2006, the contracting officer issued her decision denying the claim. Appeal File, Exhibit 14. She stated that Mr. Mora lacked the authority to make changes that

would affect the cost or duration of purchase order 263-MO-503012 and that only the contracting officer could authorize an extension of the contract. She denied that respondent had ever extended the contract, and stated that purchase order 263-MO-503012 "expired per the Terms and Conditions and defined period of performance." *Id*. She denied that any breach of a contract ending on July 31, 2005, occurred. A timely appeal to this Board followed. *Id*., Exhibit 15.

Discussion

Concerning motions for summary relief, we recently held:

> Summary relief is appropriate when the moving party is entitled to judgment as a matter of law, based on undisputed material facts. The moving party bears the burden of demonstrating the absence of genuine issues of material fact. All justifiable inferences must be drawn in favor of the nonmovant. *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986). A fact is considered to be material if it will affect the Board's decision, and an issue is genuine if enough evidence exists such that the fact could reasonably be decided in favor of the nonmovant after a hearing. *Fred M. Lyda v. General Services Administration*, CBCA 493 [07-2 BCA ¶ 33,631]; *John A. Glasure v. General Services Administration*, GSBCA 16046, 03-2 BCA ¶ 32,284.

Inversa, S.A. v. Department of State, CBCA 440 (Oct. 3, 2007) quoting *George P. Gobble v. General Services Administration*, CBCA 528 (Sept. 11, 2007).

Respondent's motion for summary relief restates the reasons the contracting officer gave in her decision denying the claim. Respondent maintains that the purchase order ended on July 31, 2005, by its terms and that respondent did not extend the purchase order. In its motion for summary relief, respondent also argues that respondent did not breach the purchase order by confiscating Mr. Larson's security badge because appellant fully performed the purchase order's work. Respondent's Memorandum in Support of Its Motion for Summary Relief (Respondent's Memorandum) at 5-11.

In this matter, appellant does not dispute the facts; instead, it differs sharply from respondent on the legal consequences to be drawn from the undisputed facts. Appellant's case, like an old-fashioned kitchen stool, rests on three legs. We consider each of those legs.

Appellant first raises a matter of contract interpretation. A contract interpretation issue is generally suitable for disposition on summary relief, because contract interpretation

presents a question of law. *Northrup Grumman Information Technology Inc. v. United States*, 78 Fed. Cl. 45, 49 (2007) (citing *Hughes Communications Galaxy, Inc. v. United States*, 998 F.2d 953, 957 (Fed. Cir.1993)); *Blake Construction Co. v. United States*, 987 F.2d 743, 746 (Fed. Cir.1993)), *Bannum, Inc. v. Department of Justice,* DOT BCA 4452, 06-1 BCA ¶ 33,228; *Ingenieria y Constructora Washington, S.A.*, ASBCA 54561, 06-02 BCA ¶ 33,379. A contract must be considered as a whole and interpreted so as to harmonize and give reasonable meaning to all its parts. *McAbee Construction, Inc. v. United States*, 97 F.3d 1431, 1435 (Fed. Cir.1996).

Appellant argues that when using the term "approximately" in purchase order 263-MO-503012, the period of performance "was of indefinite term, and thereby, of indefinite quantity." Appellant's Memorandum in Opposition to Respondent's Motion for Summary Relief (Appellant's Opposition Memorandum) at 7. Distilled to its essence, appellant argues that the term "approximately" in the purchase order made the contract an indefinite delivery indefinite quantity (IDIQ) contract.

Appellant's argument that the term "approximately" in the purchase order extends the period of performance of the purchase order to an indeterminate date beyond its termination date of July 31, 2005, fails. Appellant's interpretation would render superfluous the "quantity ordered" provision of eight months, and the grand total amount of $52,800 stated in the purchase order. The reasonable interpretation that harmonizes all provisions is the one proffered by the respondent, i.e., that the term "approximately" was intended to provide respondent flexibility in ending the purchase order before July 31, 2005, if the A-76 protest were resolved and NIH assumed direct responsibility for performance of the janitorial services requirement.

Purchase order 263-MO-503012 was not an IDIQ contract. An IDIQ contract provides for an indefinite quantity, within stated limits, of supplies or services for a fixed period. 48 CFR 16.504(a) (2005). The contract must require the Government to order and the contractor to furnish at least a stated minimum of quantity of supplies or services. *Id*. In addition, if ordered, the contractor must furnish any additional quantities not to exceed the maximum. *Id*. A solicitation and contract for an indefinite quantity must specify the total maximum and minimum quantity of supplies or services the Government will acquire under the contract. 48 CFR 16.504(a)(4)(ii). The United States Court of Appeals for the Federal Circuit (CAFC) described the purpose of, and obligations under, an IDIQ contract:

> [An] IDIQ contract provides that the government will purchase an indefinite quantity of supplies or services from a contractor during a fixed period of time, it requires the government to order only a stated minimum quantity of supplies or services. That is, under an IDIQ contract, the government is required to

> purchase the minimum quantity stated in the contract, but when the government makes that purchase its legal obligation under the contract is satisfied. Moreover, once the government has purchased the minimum quantity stated in an IDIQ contract from the contractor, it is free to purchase additional supplies or services from any other source it chooses. An IDIQ contract does not provide any exclusivity to the contractor. The government may, at its discretion and for its benefit, make its purchases for similar supplies and/or services from other sources.

Travel Centre v. Barram, 236 F.3d 1316, 1319 (Fed. Cir. 2001). Thus, respondent's contractual obligation, in the absence of a termination for convenience, was to purchase from appellant eight months of janitorial services at $6600 per month for a total of $52,800.

We now address the second leg of appellant's case, which was the principal ground for appellant's claim that it submitted to the contracting officer. Appellant maintains that it had obtained an oral extension of purchase order 263-MO-503012 from Mr. Mora, the project manager for the contract, and that respondent breached that oral extension by not placing orders for janitorial services with appellant from August 1, 2005, through September 20, 2006.

The Federal Acquisition Regulation (FAR) provides in pertinent part:

> Contracts may be entered into and signed on behalf of the Government only by contracting officers.

48 CFR 1.601(a). The FAR further provides:

> (a) Contracting officers have authority to enter into, administer, or terminate contracts and make related determinations and findings. Contracting officers may bind the Government only to the extent of the authority delegated to them.
>
> . . . .
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> (b) No contract shall be entered into unless the contracting officer ensures that all requirements of law, executive orders, regulations, and all other applicable procedures, including clearances and approvals, have been met.

48 CFR 1.602-1. Furthermore, the FAR provides that "only contracting officers acting within the scope of their authority are empowered to execute contract modifications on behalf of the Government." 48 CFR 43.102(a).

The CAFC recently emphasized that, in light of these regulations, "Where a party contracts with the government, apparent authority of the government's agent to modify the contract is not sufficient; an agent must have actual authority to bind the government." *Winter v. CATH-DR/BALTI JOINT VENTURE*, No. 1066-1359 slip op. at 7 (Fed. Cir. Aug. 17, 2007). Thus, the Court concluded that a project manager, in the absence of ratification by the contracting officer, could not bind the Government to contract modifications. *Id.* at 9-10. *See also City of Alexandria v. United States*, 737 F.2d 1022 (Fed. Cir. 1984) (Government not estopped from denying existence of contract for sale of land which would violate statutory "report and wait" provision); *Maykat Enterprises, N.V.*, GSBCA 7346, 84-3 BCA ¶ 17,510 (Government bound by only those agreements of its agents that are within the scope of their actual authority and not contrary to statutory and regulatory requirements).

In this matter, it is undisputed that for this contract Mr. Mora was a project manager, not a contracting officer. Mr. Mora, consequently, lacked actual authority to bind the respondent, either to a new contract or to a contract extension. There is no issue of ratification presented here, because the contracting officer expressly refused to issue a modification to appellant that would have formalized the alleged oral agreement between Mr. Mora and Mr. Larson. Appellant's claim of breach based upon the purported extension agreement fails. The contracting officer's initial preparation of a draft modification, which she abandoned and never presented to appellant for signature, is not legally significant to bind the Government to an extension of the purchase order. To be effective, a bi-lateral modification must be signed by both the contractor and the contracting officer. 48 CFR 43.103(a).[4]

As to the third leg of its case, appellant maintains that respondent's confiscation of Mr. Larson's security badge amounted to a breach, because appellant was unable to perform under the contract. When bringing a claim, appellant bears the burden of proving liability, causation, and resultant injury. Evidence of some damage resulting from the change or other claim event is necessary to establish entitlement. *Lovering-Johnson, Inc.*, ASBCA 53902, 05-2 BCA ¶ 33,126, at 164,171-72 (citing *Wilner Construction Co. v. United States*, 24 F.3d 1397, 1401 (Fed. Cir. 1994) (en banc); *Cosmo Construction Co. v. United States*, 451 F.2d 602, 606 (Ct. Cl. 1971)).

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[4] The requirement for signatures of both the contractor and the contracting officer on a modification form eliminates the notion of a binding oral modification between Mr. Mora and appellant that appellant urges the Board to recognize. Generally, to be binding government contracts must be in writing. *American General Leasing, Inc. v. United States*, 587 F.2d 54 (Ct. Cl. 1978). In particular, 48 CFR 43.103(a) reinforces the requirement of a written modification.

Purchase order 263-MO-503012 expired on midnight July 31, 2005. It is undisputed that appellant was paid the full contract price for services performed through July 31. Appellant's breach claim is based, in part, upon Ms. Larson's notarized declaration that she was unable to perform from August 1 through August 5, 2005. Even if we accept that version of those facts as true, they are not material since the purchase order expired on July 31.

Two tangential issues raised by appellant do not defeat respondent's motion for summary relief. Appellant complains that the Government did not consider its quotations in the re-competition of the janitorial services requirement. That matter is one of source selection, not cognizable under our Contracts Disputes Act (CDA) jurisdiction, which is limited to claims relating to a contract. 41 U.S.C.A. § 605(a) (2007); *Innovative (PBX) Telephone Service v. Department of Veterans Affairs*, CBCA 12, et al., slip op. at 16 (Sept. 27, 2007); *IMS Engineers-Architects, P.C.*, ASBCA 53471, 06-1 BCA ¶ 33,231, at 164,672, *recon. denied*, 07-1 BCA ¶ 33,461 (2006). Appellant also sees significance in respondent's procurement officials changing the proposed scope of work in future janitorial service acquisitions to require that a contractor knock and announce themselves before entering restrooms. This also involves a matter of source selection and does not involve breach of purchase order 263-MO-503012. While we see no nexus between the procurement and a contract breach, we note that procurement officials are free to define their agency's requirements absent abuse of discretion or bad faith. *IMS Engineers-Architects, P.C.*, 06-1 BCA at 164,673.

Decision

There being no material facts in dispute, respondent's motion for summary relief must be granted since respondent is entitled to prevail as a matter of law. The appeal is **DENIED**.

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ANTHONY S. BORWICK
Board Judge

We concur:

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PATRICIA J. SHERIDAN
Board Judge

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H. CHUCK KULLBERG
Board Judge